IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.112 OF 2006

ALONG WITH

CIVIL APPLICATION NO.392 OF 2006

Kamlesh A.Parmar ...Appellant

Versus

Smt.Shailakumari J.Shukla & Anr. ...Respondents

.....

Mr.K.K.Malpathak for Appellant.

Ms.Gauri Godse for Respondent No.1.

.....

CORAM: A.M.KHANWILKAR, J.

MARCH 14, 2006.

P.C.

1. Heard Counsel for the parties.

2. Admit. Ms.Gauri Godse waives notice for Respondent No.1. Respondent No.2, according to Mr.Malpathak for Appellant, has been duly served but none appears. In any case, the main contest is between the Appellant and the Respondent No.1. Hence, as short question is involved, appeal is taken up for hearing forthwith.

3. The Respondent No.1 is the decree holder in terms of the Judgment and Decree passed by the lower Court in Special Civil Suit No.268 of 1996, which pertains to Flat No.102 on the first floor of Amar-Jyoti Apartments, Lokmanya Nagar, Pada No.3, District Thane. The decree is passed against Respondent No.2, the Judgment Debtor. The said decree was put in execution. The Appellant apprehending that the decree was likely to be executed against Flat No.103 occupied by him, rushed to the Executing Court and filed Application on 22nd October 1999, which is numbered as Special Darkhast No.90 of 1998. Eventually, the same has been tried as Suit as was agreed between the parties. In the Application, the Appellant has averred that he has purchased the suit flat-which obviously means Flat No.102 in respect of which decree has been passed. The case of the Appellant is that the said flat was purchased in the year 1998 from the Respondent No.2, the Judgment Debtor and the Appellant was bonafide purchaser of the same without notice. The Appellant's case is that the Appellant was in possession of the said flat. During the evidence, however, the Appellant has

filed document which is Agreement executed between the Appellant and Respondent No.2, mentioning that it pertains to Flat No.103 in the same building. The Appellant, therefore, joined issue with the Respondent No.1, decree holder that the decree in relation to Flat No.102 is being wrongly proceeded in respect of Flat No.103 which is in lawful possession of the Appellant. Indeed, the Appellant did not examine the Respondent No.2, Judgment Debtor, nor any independent witness. On that basis, the Executing Court has proceeded to record that the Appellant has failed to establish the case made out by him. Executing Court then went on to observe that the Agreement which is pressed into service by the Appellant is not a registered document; As a result, no right flows in favour of the Appellant in respect of the suit property. It is on this premiss, the Executing Court finally concluded that from the evidence on record, it is quite clear that the flat which is in possession of the obstructionist is Flat No.102 and it is wrongly contended that it is Flat No.103. Essentially this finding is put in issue before this Court in the present Appeal.

4. After hearing Counsel for the parties, in my opinion, even if this finding is to be effaced from the record, it will make no difference to the ultimate conclusion reached by the Executing Court that the decree in relation to Flat No.102 as has been passed will have to proceed. To that extent, the view taken by the Executing Court will have to be upheld. In other words, the Executing Court shall proceed with the execution of the decree only in relation to Flat No.102 unless, the same is obstructed by some other person, who in turn, establishes his lawful right, title and interest therein. The Executing Court shall, however, ensure that the decree is proceeded only against Flat No.102 and not against Flat No.103, merely because the Appellant had rushed to the Court by way of present proceedings. Counsel for the Appellant submits on instructions that the Appellant has no claim whatsoever in respect of "Flat No.102" in Amar-Jyoti Apartments or objection to the execution of decree with regard to that flat. With this clarification, nothing further requires to be addressed in the Appeal as taken out by the Appellant before this Court. In other words, it is neither an issue of proper identity of

Flat or obstruction by some other person claiming right, title and interest in the suit Flat being Flat No.102 as such. For the Appellant has no claim with regard to Flat No.102 which is the subject matter of the decree. Appellant has reiterated that he claims to be in possession of Flat No.103 only.

5. Viewed thus, the Executing Court shall proceed with the execution of the decree as against Flat No.102 on the first floor of Amar-Jyoti Apartments at Lokmanya Nagar, Pada No.3, District Thane.

6. Appeal and the cognate Civil Application disposed of in the above terms with no order as to costs.

A.M.KHANWILKAR, J.